In re: STEW LEONARD'S.
98 AMA Docket No. M 1-1.
Decision and Order filed March 16, 2000.

Milk marketing order – New England milk marketing order – Producer-handler – Burden of proof – Strict construction of exceptions – Agency construction of rules – Equal protection.

The Judicial Officer affirmed Judge Baker's decision dismissing Petitioner's petition instituted under 7 U.S.C. § 608c(15)(A). The Judicial Officer held that the Petitioner failed to prove that the Market Administrator's denial of Petitioner's request for producer-handler status under the New England Milk Marketing Order (7 C.F.R. pt. 1001) was not in accordance with law. The Judicial Officer stated that the burden of proof was on Petitioner; that because producer-handler status was an exception to the general regulatory framework of the Agricultural Marketing Agreement Act of 1937 and the New England Milk Marketing Order, it must be strictly construed; that the Market Administrator's determination regarding Petitioner's status must be given deference; and that the Market Administrator's determination regarding Petitioner's status was consistent with the purpose of the definition of "producer-handler" within the New England Milk Marketing Order (7 C.F.R. § 1001.10) and prior case law. The Judicial Officer rejected Petitioner's contentions that the Market Administrator's determination was arbitrary and capricious, conflicted with the goal of having an adequate supply of pure and wholesome milk, and violated Petitioner's right to equal protection of the law.

Donald A. Tracy, for Respondent.
James A. Wade and Brian O'Donnell, Hartford, Connecticut, for Petitioner.
Sydney Berde, St. Paul, Minnesota, for Agri-Mark, Inc.
John H. Vetne, Newburyport, Massachusetts, for New England Dairies, Inc.
Initial Decision issued by Dorothea A. Baker, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

I. Introduction

Stew Leonard's [hereinafter Petitioner] instituted this proceeding on February 17, 1998, under the Agricultural Marketing Agreement Act of 1937, as amended [hereinafter the AMAA]; the federal order regulating the handling of milk in the New England Marketing Area (7 C.F.R. pt. 1001) [hereinafter the New England Milk Marketing Order]; and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71) [hereinafter the Rules of Practice] by filing a Petition pursuant to section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)).

Petitioner sought relief from the February 6, 1998, determination by Erik F. Rasmussen, Market Administrator for the New England Milk Marketing Order [hereinafter the Market Administrator], that a December 10, 1997, lease by Petitioner of Oakridge Farm's milking cows and milk production facilities did not confer producer-handler status on Petitioner. Petitioner alleged the Market Administrator's determination that Petitioner is not a producer-handler under the New England Milk Marketing Order has no rational basis in the law, is arbitrary and capricious, is an abuse of the Market Administrator's administrative discretion, and

deprives Petitioner of property without due process of law in violation of the Fifth Amendment to the United States Constitution (Pet. ¶ 15(3)-(4)). Petitioner requested that the Secretary of Agriculture designate Petitioner as a producer-handler and declare that Petitioner is not required to comply with "requirements of a handler under federal statutes, regulations, and milk orders" (Pet. at 5).

On April 24, 1998, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed an Answer: (1) denying the allegation that Petitioner is a producer-handler under the New England Milk Marketing Order (Answer ¶¶ 3, 9); and (2) stating that the Petition fails to state a claim upon which relief can be granted (Answer at 3).

Thereafter, Petitioner submitted to the Market Administrator a lease, dated June 16, 1998, executed by Petitioner and Oakridge Farm on the basis of which Petitioner again sought the Market Administrator's determination that Petitioner meets the definition of "producer-handler" under the New England Milk Marketing Order. On July 31, 1998, the Market Administrator advised Petitioner that its June 16, 1998, lease of Oakridge Farm's milking cows and milk production facilities did not qualify Petitioner as a producer-handler under the New England Milk Marketing Order.

On August 12, 1998, Petitioner filed Motion to Amend Petition Filed Pursuant to 7 U.S.C. § 608c(15)(A) [hereinafter Motion to Amend Petition] and Amended Petition Pursuant to 7 U.S.C. § 608c(15)(A) [hereinafter Amended Petition]. The Amended Petition states that the Market Administrator's "February 6, 1998 letter, and the continuing refusal to confirm Stew Leonard's status as a producer-handler are not in accordance with law" (Amended Pet. ¶ 19) and requests that the Secretary of Agriculture designate Petitioner as a producer-handler and declare that Petitioner "is no longer required to file handler reports and comply with all other requirements of a handler under the federal statutes, regulations, and milk orders" (Amended Pet. at 5-6). On August 21, 1998, Respondent filed Respondent's Reply to Motion to Amend Petition and Answer to Amended Petition [hereinafter Amended Answer]. The Amended Answer: (1) states that Respondent does not object to Petitioner's Motion to Amend Petition (Amended Answer at 1); (2) denies the allegation that Petitioner is a producer-handler under the New England Milk Marketing Order (Amended Answer ¶¶ 3, 9); and (3) states that the Amended Petition fails to state a claim upon which relief can be granted (Amended Answer at 3). On September 10, 1998, Administrative Law Judge Dorothea A. Baker [hereinafter the ALJ] granted Petitioner's Motion to Amend Petition and accepted Petitioner's Amended Petition (Ruling on Motion to Amend).

On January 11-12, 1999, the ALJ conducted a hearing on the Amended Petition, in Hartford, Connecticut. James A. Wade and Brian O'Donnell, Robinson & Cole, LLP, Hartford, Connecticut, represented Petitioner. Donald A. Tracy, Office of the General Counsel, United States Department of Agriculture, Washington, DC,

represented Respondent.

On March 30, 1999, Petitioner filed Petitioner's Proposed Findings of Fact, Conclusions and Order and Petitioner's Post-Hearing Brief; on May 17, 1999, Agri-Mark, Inc., and National Milk Producers Federation [hereinafter Intervenors][1] filed Proposed Findings of Fact, Conclusions and Order Submitted on Behalf of Agri-Mark, Inc. and National Milk Producers Federation; on June 11, 1999, Respondent filed Respondent's Proposed Findings of Fact, Conclusions of Law, Order, and Brief [hereinafter Respondent's Post-Hearing Brief]; and on July 15, 1999, Petitioner filed Petitioner's Reply Brief.

On September 10, 1999, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order] in which the ALJ concluded that the Market Administrator's determination that Petitioner is not a producer-handler is in accordance with law and dismissed Petitioner's Petition (Initial Decision and Order at 37-38).

On October 13, 1999, Petitioner filed Appeal and Request for Argument; on December 13, 1999, Intervenors filed Brief of Agri-Mark, Inc. and National Milk Producers Federation in Support of Motion to Dismiss Appeal of Petitioner; on December 15, 1999, Respondent filed Respondent's Reply to Appeal [hereinafter Respondent's Cross-Appeal]; on February 28, 2000, Petitioner filed Petitioner's Reply to Respondent's Cross-Appeal; and on March 3, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision and ruling on Petitioner's motion for oral argument before the Judicial Officer.

Petitioner's request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit pursuant to section 900.65(b) of the Rules of Practice (7 C.F.R. § 900.65(b)), is refused because the issues have been fully briefed by Petitioner, Respondent, and Intervenors; thus, oral argument would appear to serve no useful purpose.

While I agree with the ALJ's conclusion, many of the ALJ's findings of fact, and some of the ALJ's discussion, I have not adopted the ALJ's Initial Decision and Order as the final Decision and Order because I disagree with much of the ALJ's discussion.[2]

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[1]On June 8, 1998, Intervenors filed Motion of Agri-Mark, Inc., and National Milk Producers Federation for Leave to Participate in the Above Captioned Proceeding [hereinafter Motion to Intervene], in which Intervenors requested an order granting them leave to participate in oral argument and to file a brief in this proceeding, pursuant to section 900.57 of the Rules of Practice (7 C.F.R. § 900.57). On July 9, 1998, the ALJ granted the Motion to Intervene "to the extent that [Intervenors] may file briefs" (Ruling on Motion for Leave to Participate in Proceeding).

[2]I also disagree with the ALJ's Order dismissing Petitioner's Petition (Initial Decision and Order at 38). Petitioner filed its Petition on February 17, 1998. On August 12, 1998, Petitioner filed its Motion to Amend Petition and Amended Petition. On September 10, 1998, the ALJ granted Petitioner's Motion to Amend Petition and accepted Petitioner's Amended Petition (Ruling on Motion to Amend). I infer that Petitioner withdrew its Petition and substituted in its stead Petitioner's Amended Petition. Therefore, I find that the ALJ's dismissal of Petitioner's Petition is error. Instead, I dismiss Petitioner's

II. Applicable Statutory and Regulatory Provisions

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 26—AGRICULTURAL ADJUSTMENT

. . . .

SUBCHAPTER III—COMMODITY BENEFITS

. . . .

§ 608c. Orders regulating the handling of commodity

. . . .

(15) Petition by handler for modification of order or exemption; court review of ruling of Secretary

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

7 U.S.C. § 608c(15)(A).

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

Amended Petition (Decision and Order, *infra*).

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

. . . .

CHAPTER X—AGRICULTURAL MARKETING SERVICE (MARKETING AGREEMENTS AND ORDERS; MILK) DEPARTMENT OF AGRICULTURE

. . . .

PART 1001—MILK IN THE NEW ENGLAND MARKETING AREA

Subpart —Order Regulating Handling

. . . .

DEFINITIONS

. . . .

§ 1001.10 Producer-handler.

Producer-handler means any person who, during the month, is both a dairy farmer and a handler who meets all of the following conditions:

(a) Provides as the person's own enterprise and at the person's own risk the maintenance, care, and management of the dairy herd and other resources and facilities that are used to produce milk, to process and package such milk at the producer-handler's own plant, and to distribute it as route disposition.

7 C.F.R. § 1001.10(a).

III. Findings of Fact

1. Petitioner is a "handler," as defined in section 1001.9 of the New England Milk Marketing Order (7 C.F.R. § 1001.9), and at all times material to this proceeding, Petitioner operated as a handler (Tr. 44-45, 51, 133, 142-44, 178-79, 260).

2. Petitioner is a partnership which has operated a grocery business since 1969. Petitioner is engaged in the business of selling milk and other dairy and food products to consumers at retail food stores in Norwalk and Danbury, Connecticut, with a principal place of business located at 100 Westport Avenue, Norwalk,

Connecticut. (Amended Pet. ¶¶ 1-2, 4.)

3. At its retail food store in Norwalk, Connecticut, Petitioner distributes fluid milk products processed at its fluid milk processing plant located on the same premises. At a second retail food store in Danbury, Connecticut, Petitioner distributes fluid milk products processed at the Norwalk fluid milk processing plant. (Tr. 22-23.)

4. Petitioner's Norwalk, Connecticut, retail food store and fluid milk processing plant is owned by a partnership consisting of Marianne Leonard and the Marianne Leonard 1993 Trust (PX 1; Tr. 21-22). Petitioner has no ownership interest in the Danbury, Connecticut, retail food store through which it distributes a portion of the fluid milk products processed at its Norwalk fluid milk processing plant. The Danbury, Connecticut, store is owned by a limited liability corporation whose ownership is divided among various members of the Leonard family other than the partnership owners of Petitioner. (PX 1; Tr. 22-25.)

5. Petitioner represents itself as operating the world's largest dairy store (Tr. 128). Petitioner receives and processes about two-thirds of a tanker truck of milk each day and sells approximately 1.2 million gallons of milk per year (Tr. 119, 493-94).

6. Prior to January 1, 1998, Petitioner received its entire raw milk supply from Agri-Mark, Inc., a cooperative association, whose dairy farmer members supply milk to handlers regulated by the New England Milk Marketing Order (Tr. 215-16).

7. Oakridge Farm is a dairy farm in Ellington, Connecticut, which owns approximately 550 cows (Tr. 56-57). Prior to January 1, 1998, Oakridge Farm was a member of Agri-Mark, Inc. (Tr. 210).

8 . Oakridge Farm is owned by Atlas Associates, a partnership whose partners, according to public records in Ellington, Connecticut, are Corbin Bahler, Kenneth Bahler, and S. Owen Bahler. There is a second certificate which lists Atlas Associates, d/b/a Oakridge Farm. (Tr. 267.)

9. Bahler Farms, Inc., is a corporation that operates a dairy farm which is contiguous to Oakridge Farm (Tr. 102, 267).

10. Vern Bahler is the president and a director of Bahler Farms, Inc.; David Bahler is the secretary and a director of Bahler, Farms, Inc.; and Corbin Bahler is the agent for Bahler Farms, Inc. (Tr. 267). Petitioner has no interest in Bahler Farms, Inc. (Tr. 48).

11. On December 10, 1997, Kenneth Bahler, as "Partner" on behalf of Oakridge Farm and Stewart J. Leonard, Jr., as "President" on behalf of Petitioner, executed a document entitled "Lease Agreement." Pursuant to the Lease Agreement, Petitioner agreed to: (1) lease Oakridge Farm's entire herd of milking cows, barns, milking parlors, personal property, and all equipment necessary to produce raw milk and its related products; (2) transport the milk products from Oakridge Farm to Petitioner's facilities for processing, packaging, sale, and

distribution at its own expense; (3) pay for all ordinary and necessary expenses relating to production, processing, and packaging of milk and its related products; (4) pay Bahler Farms, Inc., a management fee; and (5) buy corn silage from Bahler Farms, Inc. (PX 2.)

12. On December 18, 1997, Petitioner notified the Market Administrator that Petitioner had entered into an agreement to receive milk directly from Oakridge Farm with the intention of becoming a producer-handler. On December 30, 1997, the Market Administrator responded to Petitioner's letter by quoting the requirements in 7 C.F.R. § 1001.10 for producer-handler status under the New England Milk Marketing Order and by advising Petitioner that the versions of the proposed lease agreement with "Bahler Oak Ridge Farm" that had been provided to the Market Administrator's office, failed to meet the requirements of the producer-handler provisions of the New England Milk Marketing Order, as follows:

> Stewart J. Leonard
> 100 Westport Avenue
> Norwalk, CT 06851-3999
>
> Gentlemen:
>
> We have received your letter dated December 18, 1997 stating that you have entered into an agreement to receive milk directly from the Bahler Oak Ridge Farm and that your intention is to become a producer-handler.
>
> Section 1001.10 of Federal Order No. 1 requires in part that a producer-handler "*provides as the person's own enterprise and at the person's own risk the maintenance, care, and management of the dairy herd and other resources and facilities that are used to produce milk, to process and package such milk at the producer-handler's own plant, and to distribute it as route disposition.*"
>
> We have discussed this matter on several occasions during the past four months. To date, the versions of the proposed lease agreement between Stew Leonard's Dairy and the Bahler Oak Ridge Farm which you have provided to this office have failed to meet the order requirements.
>
> The status of Stew Leonard's Dairy will not be changed to that of a producer-handler until you submit for review and approval a signed copy of the lease which fully meets the requirements of section 1001.10.
>
> Stew Leonard's Dairy will continue to be a pool handler and file monthly Form 1 reports and make equalization payments into the New England

Market Order pool.

PX 10 (emphasis in original).

13. On January 5, 1998, Petitioner's counsel sent a copy of the executed December 10, 1997, Lease Agreement to the Market Administrator with a letter requesting that the Market Administrator identify the manner in which the lease fails to meet the requirements of the producer-handler provisions of the New England Milk Marketing Order, as follows:

> Mr. Erik F. Rasmussen
> Market Administrator
> U.S. Department of Agriculture
> P.O. Box 1478
> Boston, MA 02205-1478
>
> Re: **Stew Leonard's Dairy Store**
>
> Dear Mr. Rasmussen:
>
> This office represents Stew Leonard's Dairy of Norwalk, Connecticut. We are in receipt of your letter dated December 30, 1997 addressed to Stewart J. Leonard in which you state that the lease between Stew Leonard's Dairy Store and Bahler Oak Ridge Farm fails to meet the requirement of Section 1001.10 of Federal Order No. 1.
>
> I am enclosing a copy of the signed lease as requested. Would you please advise in what respects the lease fails to meet the requirements of the aforesaid Federal order. We will consider your comments and take such steps as we deem appropriate.

PX 12.

14. On January 15, 1998, the Market Administrator responded, advising Petitioner's counsel that the December 10, 1997, lease of Oakridge Farm's milking cows and milk production facilities fails to cause Petitioner to meet the requirements for producer-handler status under the New England Milk Marketing Order, as follows:

> Robinson & Cole LLP
> One Commercial Plaza
> 280 Trumbull Street
> Hartford, CT 06103-3597

Attention: Mr. James A. Wade

Gentlemen:

We have reviewed the copy of the signed lease agreement between Stew Leonard's Dairy and Oakridge Farm of Ellington, Connecticut.

As written, the proposed lease fails to meet the Order requirement that the handler "*provides as the person's own enterprise and risk the maintenance, care, and management of the dairy herd and other resources and facilities that are used to produce milk, to process and package such milk at the producer-handler's own plant, and to distribute it as route distribution.*"

Specifically, Paragraph 3 states that the parties "agree to review and adjust the payments called for herein on a quarterly basis." This provision, in effect, eliminates any risk of loss to Stew Leonard's Dairy as a result of "uncertainties that relate to the cost of farming." Such risk is inherent to a producer-handler's operation and must be assumed by Stew Leonard's Dairy before that handler's status is changed to that of a producer-handler.

In addition, the fixed amount and the frequency of the management fee to be paid to Bahler Farms, Inc., by Stew Leonard (also noted in Paragraph 3) must be specified in the lease.

PX 11 (emphasis in original).

15. On January 20, 1998, Petitioner's counsel sent a letter and a proposed new lease between Petitioner and Oakridge Farm to the Market Administrator inquiring whether Petitioner would meet the requirements for a producer-handler if it re-executed the December 10, 1997, lease with Oakridge Farm with modifications indicated on the proposed lease, as follows:

Mr. Erik F. Rasmussen
Market Administrator
U.S. Department of Agriculture
P.O. Box 1478
Boston, MA 02205-1478

Re: **Stew Leonard's Dairy Store**

Dear Mr. Rasmussen:

Enclosed please find a copy of the lease between Stew Leonard's and

Oakridge Farm which incorporates the changes thereto suggested in your letter of January 15, 1998. Assuming the parties re-execute the lease with these modifications therein, will that meet the requirements of the Federal Milk Order? Please advise at once and I will take the necessary steps to have the lease re-executed and forward a signed copy to you.

PX 13.

16. On February 6, 1998, the Market Administrator notified Petitioner by letter that he had reviewed the various leases that Petitioner had proposed to change its status from a handler under the New England Milk Marketing Order to a producer-handler, exempt from the regulatory provisions applicable to handlers. The letter states that, in contrast to currently operating producer-handlers who meet the regulatory requirements for producer-handler status under the New England Milk Marketing Order, Petitioner proposes a legal construct merely to circumvent the AMAA, as follows:

Stew Leonard's Dairy
100 Westport Avenue
Norwalk, CT 06851-3999

Dear Mr. Leonard:

This office has reviewed the various leases you have proposed. The stated purpose of the leases is to change the regulatory status of Stew Leonard's Dairy from a handler operating a pool distributing plant that purchases pool milk from producers to status as a producer-handler.

There is precedent by this office to approve farm leases for a producer-handler. These approvals follow the needs of currently operating producer-handlers to utilize additional sites for expansion purposes.

The situation at Stew Leonard's Dairy is distinct from proposals received by some producer-handlers. You propose to construct a legal framework, with our assistance, that would allow you to circumvent the Agricultural Marketing Agreement Act, 7 U.S.C. 608(c)(5) [sic]. The determination has been made that the means you propose to meet the producer-handler qualification under Section 1001.10(a) violate the letter and intent of the Act and this section.

Stew Leonard's Dairy must continue to file handler reports as a pool distributing plant. If you wish to challenge this decision, refer to 7 U.S.C. (608)(c)(15)(A) [sic].

PX 14.

17. On February 17, 1998, Petitioner filed its Petition, seeking relief from the Market Administrator's February 6, 1998, determination that Petitioner's December 10, 1997, lease of Oakridge Farm's milking cows and milk production facilities did not confer producer-handler status on Petitioner (Pet.).

18. In response to the Market Administrator's comments in his January 15, 1998, letter (PX 11), Petitioner executed a new Lease Agreement with Oakridge Farm on June 16, 1998 (PX 3, PX 13, PX 15).

19. Vern Bahler, as "Partner" on behalf of Oakridge Farm and Stew Leonard, Jr., as "President" on behalf of Petitioner, executed the June 16, 1998, Lease Agreement. The Lease Agreement contains the following operative terms:

1. Stew Leonard's hereby leases from Oakridge Farm its entire herd of milking cows at the rate of $l.00 per cow per day. Payment will be made on a monthly basis. In determining whether a cow is deemed to be part of Oakridge Farm's herd of milking cows, a cow shall be so counted from the date it is first milked until it is culled or dies. Inventory will be established on the last day of each month and verified by the DHI (Dairy Herd Management Services) records. Stew Leonard's agrees to replace culls and/or attrition with newly bred heifers.

2. In addition to the foregoing lease rate, Stew Leonard's hereby leases from Oakridge Farm its barns, milking parlors, personal property and all equipment necessary to produce raw milk and its related products for $12,000 a month. Stew Leonard's agrees that it will transport the milk products from Oakridge Farm to its facilities for processing, packaging, sale and distribution at its own expense.

3. In addition to the foregoing lease rate, Stew Leonard's agrees to pay for all ordinary and necessary expenses related to the production, processing and packaging of milk. Also, Stew Leonard's agrees to assume all risk, responsibility, and maintenance of the cows, equipment, buildings, and labor. The aforesaid risks and responsibilities include, but are not limited to, life and death of all animals, damage and destruction resulting from acts of God (including storms, fires, pestilence, drought, etc.), damage and destruction resulting from employee negligence and/or malfeasance. Stew Leonard's agrees to buy corn silage from Bahler Farms, Inc. when needed. Stew Leonard's also agrees to pay Bahler Farms, Inc. a management fee of $2,000 per month.

4. The term of the agreement shall be for a term of two years. Advance written notice, 60 days prior to change, is required in the event of any

change in ownership, or key management personnel by either Stew Leonard's or Oakridge Farm. If either Stew Leonard's or Oakridge Farm fails to approve of the aforementioned change, they will have the option to terminate the lease on the last day of the month of the change.

PX 3.

20. On June 22, 1998, Petitioner's counsel sent a letter and a copy of the June 16, 1998, lease between Petitioner and Oakridge Farm to the Market Administrator, requesting that the Market Administrator determine that Petitioner is a producer-handler under the New England Milk Marketing Order based on the June 16, 1998, lease, as follows:

Mr. Erik F. Rasmussen
Market Administrator
U.S. Department of Agriculture
P.O. Box 1478
Boston, MA 02205-1478

Re: **Stew Leonard's Dairy**

Dear Mr. Rasmussen:

As requested by Attorney Don Tracy during a telephone conversation with Joan Grear of my office, enclosed please find a copy of the revised and executed lease between Stew Leonard's and Oakridge Farm. We understand from Mr. Tracy that the enclosed lease together with the Grade A Milk Production License issued by the State of Connecticut, will provide you with sufficient basis to confirm Stew Leonard's designation as a producer-handler.

Mr. Tracy also told Joan Grear that upon your receipt of the enclosed lease, we could expect to receive a letter from you confirming the producer-handler designation. We would appreciate it if you would forward same at your earliest convenience. We will withdraw our 15(A) petition upon our receipt of documentation confirming the producer-handler designation.

PX 15.

21. On July 31, 1998, the Market Administrator notified Petitioner's counsel that the June 16, 1998, lease between Petitioner and Oakridge Farm did not alter the Market Administrator's determination that Petitioner is not a producer-handler under the New England Milk Marketing Order, as follows:

Mr. James A. Wade
Robinson & Cole LLP
One Commercial Plaza
280 Trumbull Street
Hartford, CT 06103-3597

Dear Mr. Wade:

I have received your letter dated June 22, lease agreement, and Grade A Milk Production License. A review of this additional information has not altered the determination of February 6 that Stew Leonard's Dairy is not a producer-handler.

Please continue to have your client file handler reports and producer payrolls as they have in the past.

PX 16.

22. On August 12, 1998, Petitioner filed its Amended Petition, seeking relief from the February 6, 1998, notice, and continuing determination by the Market Administrator that Petitioner is not a producer-handler under the New England Milk Marketing Order (Amended Pet.).

23. Since leasing Oakridge Farm's milking cows and milk production facilities, Petitioner has paid the cost of fertilizing cows, hardware maintenance and repair, equipment repair, feed, payroll, veterinary services, and services to keep track of animals (Tr. 188-90). Petitioner has purchased insurance to cover its obligations with respect to Oakridge Farm, with a policy providing a benefit of $1 million per occurrence, $2 million per year, and with an umbrella benefit of $45 million per year (Tr. 498-99).

24. Oakridge Farm and Bahler Farms, Inc., are operated jointly in that they "share equipment and a full-time calf raiser, a mechanic and full-time milkers" (Tr. 102, 266-68).

25. Vern Bahler and Dave Bahler, who operate Bahler Farms, Inc., have check-writing authority for Oakridge Farm (Tr. 97-98).

26. The Bahlers purchase feed and other materials jointly for Oakridge Farm and Bahler Farms, Inc. (Tr. 98-99, 103-04).

27. Records for Oakridge Farm are kept at Bahler Farms, Inc. (Tr. 268-69).

28. Oakridge Farm and Bahler Farms, Inc., share the financial risk of a loan for which they jointly pledged security to First Pioneer Farm Credit (Tr. 269).

29. Oakridge Farm and Bahler Farms, Inc., jointly insure against any loss that may arise or result from their joint operation (Tr. 270-71).

30. Petitioner has no leasehold or other interest in the actual farmland of Oakridge Farm (PX 3).

31. Every producer-handler in the New England Milk Marketing Order is a dairy farmer who owns a dairy farm (Tr. 252).

32. Of the 20 producer-handlers in the New England Milk Marketing Order, three have leased extra cows and milk production facilities to increase their milk production by no more than 25 per centum (Tr. 252-54). The terms of these leases are reflected in PX 9, PX 17, and PX 18. The Market Administrator permits these three enterprises, which were producer-handlers at the time they entered into their respective leases, to obtain up to 25 per centum of their milk from leased cows without jeopardizing their status as producer-handlers (Tr. 253). The Market Administrator concedes these lessees do not provide, as their own enterprise and at their own risk, the maintenance, care, and management of the leased cows and other resources and facilities used to produce the milk from the leased cows (Tr. 317, 425, 441).

33. Petitioner does not own a dairy farm and does not know how to operate a dairy farm (Tr. 145).

34. If Petitioner were to have been treated as a producer-handler, it would have had a competitive advantage vis-a-vis fully regulated handlers because it would not have had to account to the pool for the use of milk nor make otherwise required payments to the Northeast Dairy Compact (Tr. 244-45, 250). Petitioner would have avoided, if it had been a producer-handler, payments as high as 37 cents per gallon (RX C; Tr. 247-52). If Petitioner were a producer-handler, Petitioner would have as much as a 25-cent per gallon advantage over its competitor, Stop & Shop Supermarket Companies. Differences of less than one cent per gallon can have a competitive impact in the dairy industry. (Tr. 451-52, 482-85.)

35. The competitive advantage to Petitioner, described in Findings of Fact No. 34, would interfere with the orderly operation of the New England Milk Marketing Order and the orderly marketing of milk in the New England marketing area[3] (Tr. 245).

36. The quality control that Petitioner seeks by leasing Oakridge Farm's milking cows and milk production facilities are completely independent of Petitioner's status. As a handler, Petitioner has accomplished its desired quality control goals while accounting to the pool for the use of its milk. (Tr. 50-51, 54-55, 93-96, 171-72, 258-59.)

37. Petitioner's lease of Oakridge Farm's milking cows and milk production facilities did not change the details of the operation of Oakridge Farm. Before the lease, the Bahlers operated Oakridge Farm, with connections to Bahler Farms, Inc., and after the lease, the Bahlers operated Oakridge Farm, with the same connections to Bahler Farms, Inc. (Tr. 93.)

38. The record establishes that the Market Administrator's determination was in accordance with law.

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[3]The term "New England marketing area" is defined in 7 C.F.R. § 1001.2.

39. The record does not establish that Petitioner is a dairy farmer.

40. The record does not establish that Petitioner provides, as Petitioner's own enterprise and at Petitioner's own risk, the maintenance, care, and management of Oakridge Farm's dairy herd and Oakridge Farm's resources and facilities used to produce milk.

41. The record does not establish that Petitioner is a "producer-handler," as defined in section 1001.10 of the New England Milk Marketing Order (7 C.F.R. § 1001.10).

IV. Discussion

A. The Issue

The issue to be resolved in this proceeding is whether the Market Administrator's determination that Petitioner is not a "producer-handler," as defined in section 1001.10 of the New England Milk Marketing Order (7 C.F.R. § 1001.10), is in accordance with law. Petitioner now obtains its entire milk supply by leasing milking cows and milk production facilities and maintains that it is now producing and processing milk as its own enterprise and at its own risk, as required for producer-handler status. Respondent denies that Petitioner operates a dairy farm as its own enterprise and at its own risk.

B. The Burden of Proof

It is well settled that the burden of proof in a proceeding instituted under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) rests with the petitioner, and in order to prevail in this proceeding, Petitioner has the burden of proving that the Market Administrator's determination that Petitioner is not a "producer-handler," as defined in section 1001.10 of the New England Milk Marketing Order (7 C.F.R. § 1001.10), is not in accordance with law.[4] I find that Petitioner has not met its

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[4] *United States v. Rock Royal Co-op., Inc.,* 307 U.S. 533 (1939); *Lewes Dairy, Inc. v. Freeman,* 401 F.2d 308, 316-17 (3d Cir. 1968), *cert. denied,* 394 U.S. 929 (1969); *Boonville Farms Coop., Inc. v. Freeman*, 358 F.2d 681, 682 (2d Cir. 1966); *United States v. Mills,* 315 F.2d 828, 836, 838 (4th Cir.), *cert. denied sub nom. Willow Farms Dairy, Inc. v. Freeman,* 374 U.S. 832 (1963), *cert. denied,* 375 U.S. 819 (1963); *Sterling Davis Dairy v. Freeman,* 253 F. Supp. 80, 83 (D.N.J. 1965); *Windham Creamery, Inc. v. Freeman,* 230 F. Supp. 632, 635-36 (D.N.J. 1964), *aff'd,* 350 F.2d 978 (3d Cir. 1965), *cert. denied,* 382 U.S. 979 (1966); *Bailey Farm Dairy Co. v. Jones,* 61 F. Supp. 209, 217 (E.D. Mo. 1945), *aff'd,* 157 F.2d 87 (8th Cir.), *cert. denied,* 329 U.S. 788 (1946); *Wawa Dairy Farms, Inc. v. Wickard,* 56 F. Supp. 67, 70 (E.D. Pa. 1944), *aff'd,* 149 F.2d 860 (3d Cir. 1945); *In re Garelick Farms, Inc.,* 56 Agric. Dec. 37, 39 (1997); *In re Mil-Key Farm, Inc.,* 54 Agric. Dec. 26, 54 (1995); *In re Hershey Chocolate U.S.A.*, 53 Agric. Dec. 17, 32 (1994), *aff'd*, No. 1:CV-94-945 (M.D. Pa. Feb. 3, 1995); *In re Jet Farms, Inc.*, 50 Agric. Dec. 1373, 1406 (1991); *In re Andersen Dairy, Inc.,* 49 Agric. Dec. 1, 11 (1990); *In re Belridge Packing Corp.,* 48 Agric. Dec. 16, 72-73 (1989), *aff'd sub nom.*

burden. Moreover, the evidence establishes that Petitioner is not a dairy farmer (Findings of Fact Nos. 19, 25, 30, 33, 37, 39, 41) and that Petitioner does not provide, as Petitioner's own enterprise and at Petitioner's own risk, the maintenance, care, and management of the Oakridge Farm dairy herd and other resources and facilities used to produce milk (Findings of Fact Nos. 24-30, 33, 37, 39-41). Thus, Petitioner is not a "producer-handler," as defined in section 1001.10 of the New England Milk Marketing Order (7 C.F.R. § 1001.10).

C. The Historical Necessity For Milk Market Regulations Dictate That Producer-Handler Status Is An Exception To Be Strictly Construed

Milk market regulations are rooted in two characteristics: (1) fluid milk commands a higher price than milk put to other uses, even though the quality of the milk is the same; and (2) milk production varies with the season, so that a herd of cows large enough to meet consumer demand in the winter will, in the more productive warmer months, produce an oversupply of milk. *Zuber v. Allen,* 396 U.S. 168, 172-73 (1969). Prior to regulation, milk processors were able to demand bargain prices during the summer. Milk producers increased production to maintain their income and a disequilibrium snowballed. In response, Congress enacted a series of laws ending with the AMAA, which is the statutory basis for the price regulation involved in this proceeding. One goal of price regulation is to discourage cutthroat competition among milk producers to sell their milk for use as fluid milk. *United States v. Rock Royal Co-op, Inc.,* 307 U.S. 533 (1939). The

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Farmers Alliance for Improved Regulations (FAIR) v. Madigan, No. 89-0959-RCL, 1991 WL 178117 (D.D.C. Aug. 30, 1991); *In re Borden, Inc.,* 46 Agric. Dec. 1315, 1374 (1987), *aff'd,* No. H-88-1863 (S.D. Tex. Feb. 13, 1990), *printed in* 50 Agric. Dec. 1135 (1991); *In re Echo Spring Dairy, Inc.*, 45 Agric. Dec. 41, 56 (1986); *In re County Line Cheese Co.,* 44 Agric. Dec. 63, 81 (1985), *aff'd*, No. 85-C-1811 (N.D. Ill. June 25, 1986), *aff'd,* 823 F.2d 1127 (7th Cir. 1987); *In re John Bertovich*, 36 Agric. Dec. 133, 140 (1977); *In re Aldovin Dairy, Inc.,* 42 Agric. Dec. 1791, 1797 (1983), *aff'd,* No. 84-0088 (M.D. Pa. Nov. 20, 1984); *In re Moser Farms, Dairy, Inc.,* 41 Agric. Dec. 7, 8-9 (1982); *In re Fitchett Bros., Inc.*, 34 Agric. Dec. 1, 3 (1975); *In re Michaels Dairies, Inc.,* 33 Agric. Dec. 1663, 1701 (1974), *aff'd,* No. 22-75 (D. D.C. Aug. 21, 1975), *printed in* 34 Agric. Dec. 1319 (1975), *aff'd mem.,* 546 F.2d 1043 (D.C. Cir. 1976); *In re Yasgur Farms, Inc.,* 33 Agric. Dec. 389, 401-02 (1974); *In re Fitchett Brothers, Inc.,* 31 Agric. Dec. 1552, 1571 (1972); *In re Clyde Lisonbee*, 31 Agric. Dec. 952, 961 (1972); *In re Sherman Fitzgerald*, 31 Agric. Dec. 593, 605-06 (1972), *aff'd, United States v. Fitzgerald*, C 227-66 and C 137-72 (D. Utah 1973), *printed in* 32 Agric. Dec. 1100 (1973); *In re Hawthorn-Mellody, Inc.*, 30 Agric. Dec. 1774, 1791-92 (1971); *In re Walter Neugebauer*, 27 Agric. Dec. 187, 191 (1968), *aff'd, Neugebauer v. Secretary of Agriculture*, (D.S.D. 1970), *printed in* 29 Agric. Dec. 120 (1970); *In re Dade County Dairies, Inc.*, 24 Agric. Dec. 1567, 1571 (1965); *In re Adam L. Liptak,* 24 Agric. Dec. 1176, 1181 (1965); *In re Cecil Duncan*, 19 Agric. Dec. 1110, 1115 (1960); *In re Newark Milk & Cream Co*., 18 Agric. Dec. 211, 214 (1959), *aff'd, Newark Milk & Cream Co. v. Benson*, Civil Action No. 242-59 (D.N.J. Dec. 30, 1959), *printed in* 19 Agric. Dec. 54 (1960); *In re Valley Creamery Co., Inc.,* 13 Agric. Dec. 979, 981 (1954); *In re M.H. Renken Dairy Co.*, 11 Agric Dec. 264, 272 (1952); *In re St. Charles Dairy*, 7 Agric. Dec. 943, 946 (1948).

AMAA and the New England Milk Marketing Order are designed to achieve a fair division of the more profitable fluid milk market among all milk producers, thus eliminating the disequilibrium which had been a consequence of cutthroat competition among milk producers striving for the fluid milk market. By use of equalization payments, milk producers receive the same price regardless of the ultimate use to which their milk is put. The procedure for achieving equalization generally is that the market administrator computes the value of milk used by each handler by multiplying the quantity of milk the handler uses in each class by the class price and adding the results. The values for all handlers are then combined into one total. The result is divided by the total quantity of milk that is priced under the regulatory program. The figure thus obtained is the basic or uniform price which must be paid to milk producers for their milk. Each handler whose own total use value of milk for a particular delivery period, i.e., a calendar month, is greater than that handler's total payments at the uniform price is required to pay the difference into an equalization or producer-settlement fund. Each handler whose own total use value of milk is less than that handler's total payments to milk producers at the uniform price is entitled to withdraw the amount of the difference from the equalization or producer-settlement fund. Thus, a composite or uniform price is effectuated by means of the equalization or producer-settlement fund.

Most handlers are fully regulated by milk marketing orders. However, some milk producers process the milk which they produce. A milk producer which is also a handler of the milk which it produces and which strictly conforms to the definition of "producer-handler," under the milk marketing order that is applicable to that milk producer, is exempt from a number of the milk marketing order provisions applicable to fully regulated handlers. Historically, producer-handlers were normally "family-type" operations (25 Fed. Reg. 5494 (1960); 25 Fed. Reg. 7825 (1960)). Customarily, a producer-handler has a relatively small operation, is operating in a self-sufficient manner, and is not a major competitive factor in the market for regulated handlers. The milk that is processed, packaged, and distributed by a producer-handler is obtained from the producer-handler's own production. Any fluctuation in a producer-handler's milk needs is met through the producer-handler's own production, and the producer-handler disposes of any excess milk supply at his or her own expense.[5]

The Secretary of Agriculture could elect to fully regulate producer-handlers under the AMAA. The exemption allowed producer-handlers arises not from the lack of authority under the AMAA to regulate producer-handlers, but from the determination that full regulation of a handler meeting the definition of a producer-handler is not necessary to achieve the declared policy of the AMAA in

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[5] *In re Kreider Dairy Farms, Inc.,* 54 Agric. Dec. 805, 850 (1995), *remanded*, No. 95-6648, 1996 WL 472414 (E.D. Pa. Aug. 15, 1996), *order denying late appeal on remand*, 57 Agric. Dec. 397 (1998), *aff'd*, 190 F.3d 113 (3d Cir. 1999); *In re Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 63-64 (1995).

the marketing area.[6] Producer-handler status is an exception to the general regulatory framework of the AMAA, and therefore, it must be strictly construed.[7] In order to obtain producer-handler status, a petitioner must strictly comply with the definition of "producer-handler" in the milk marketing order that is applicable to that petitioner. The evidence in this proceeding does not establish that Petitioner is a "producer-handler," as defined in section 1001.10 of the New England Milk Marketing Order (7 C.F.R. § 1001.10). The evidence establishes that Petitioner is not a dairy farmer (Findings of Fact Nos. 19, 25, 30, 33, 37, 39, 41) and that Petitioner does not provide, as Petitioner's own enterprise and at Petitioner's own risk, the maintenance, care, and management of the Oakridge Farm dairy herd and other resources and facilities used to produce milk (Findings of Fact Nos. 24-30, 33, 37, 39-41).

D. The Market Administrator's Determination is Accorded Deference

An administrative agency's interpretation of its own regulations must be accorded deference in any administrative or court proceeding, and an agency's construction of its own regulations becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulations.[8]

The Market Administrator is the official responsible for administering the New England Milk Marketing Order, and the Market Administrator is specifically

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[6] *See Freeman v. Vance*, 319 F.2d 841 (5th Cir. 1963) (per curiam), *cert. denied*, 377 U.S. 930 (1964); *Ideal Farms, Inc. v. Benson*, 288 F.2d 608 (3d Cir. 1961), *cert. denied*, 372 U.S. 965 (1964); *In re Echo Spring Dairy, Inc.*, 45 Agric. Dec. 41, 56 (1986); *In re John Bertovich*, 36 Agric. Dec. 133, 141-42 (1977); *In re Associated Milk Producers, Inc.*, 33 Agric. Dec. 976, 992-93 (1974); *In re Clyde Lisonbee*, 31 Agric. Dec. 952, 963 (1972); *In re Walter Neugebauer*, 27 Agric. Dec. 187, 192 (1968), *aff'd, Neugebauer v. Secretary of Agriculture*, (D.S.D. 1970), *printed in* 29 Agric. Dec. 120 (1970); *In re Independent Milk Producer-Distributors' Ass'n*, 18 Agric. Dec. 881, 882-83 (1959) (Denial of Interim Relief); *In re Benbush Dairy*, 17 Agric. Dec. 1185, 1188 (1958); *In re Acme Breweries, Inc.*, 9 Agric. Dec. 1418, 1427-30 (1950), *aff'd, Acme Breweries v. Brannan*, 109 F. Supp. 116 (N.D. Cal. 1952).

[7] *In re Kreider Dairy Farms, Inc.,* 54 Agric. Dec. 805, 826-27 (1995), *remanded*, No. 95-6648, 1996 WL 472414 (E.D. Pa. Aug. 15, 1996), *order denying late appeal on remand*, 57 Agric. Dec. 397 (1998), *aff'd*, 190 F.3d 113 (3d Cir. 1999); *In re Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 67 (1995); *In re Echo Spring Dairy, Inc.*, 45 Agric. Dec. 41, 56 (1986); *In re John Bertovich*, 36 Agric. Dec. 133, 138 (1977); *In re Associated Milk Producers, Inc.*, 33 Agric. Dec. 976, 983 (1974); *In re Yasgur Farms, Inc.*, 33 Agric. Dec. 389, 405 (1974); *In re Andrew W. Leonberg*, 32 Agric. Dec. 763, 800 (1973), *appeal dismissed*, No. 73-535 (W.D. Pa. Oct. 3, 1973); *In re Sherman Fitzgerald*, 31 Agric. Dec. 593, 605-06 (1972), *aff'd, United States v. Fitzgerald*, C 227-66 and C 137-72 (D. Utah 1973), *printed in* 32 Agric. Dec. 1100 (1973).

[8] *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Stinson v. United States*, 508 U.S. 36, 45 (1993); *INS v. Stanisic*, 395 U.S. 62, 72 (1969); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945).

authorized to make rules and regulations to effectuate the terms and provisions of the New England Milk Marketing Order (7 C.F.R. § 1000.3(b)(2); Tr. 234). The Market Administrator has been working with milk marketing orders for 25 years and has been the New England Milk Marketing Order market administrator for 9 years (Tr. 231-34). The Market Administrator makes monthly determinations regarding the producer-handler status of enterprises regulated under the New England Milk Marketing Order (Tr. 241-43).

It is well settled that an official who is responsible for administering a regulatory program has authority to interpret the provisions of the statute and regulations. Moreover, the interpretation of that official is entitled to great weight.[9]

The doctrine of affording considerable weight to interpretation by the administrator of a regulatory program is particularly applicable in the field of milk. As stated by the court in *Queensboro Farms Products, Inc. v. Wickard*, 137 F.2d 969, 980 (2d Cir. 1943) (footnotes omitted):

> The Supreme Court has admonished us that interpretations of a statute by officers who, under the statute, act in administering it as specialists advised by experts must be accorded considerable weight by the courts. If ever there was a place for that doctrine, it is, as to milk, in connection with the administration of this Act because of its background and legislative history. The Supreme Court has, at least inferentially, so recognized.

Similarly, in *Blair v. Freeman*, 370 F.2d 229, 232 (D.C. Cir. 1966), the court stated:

> A court's deference to administrative expertise rises to zenith in connection with the intricate complex of regulation of milk marketing. Any court is chary lest its disarrangement of such a regulatory equilibrium reflect lack of judicial comprehension more than lack of executive authority.

Therefore, I give considerable weight to the Market Administrator's determination that Petitioner is not a producer-handler under the New England Milk Marketing Order.

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[9] *Lawson Milk Co. v. Freeman*, 358 F.2d 647, 650 (6th Cir. 1966); *In re Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 76-77 (1995); *In re Andersen Dairy, Inc.*, 49 Agric. Dec. 1, 19 (1990); *In re Conesus Milk Producers*, 48 Agric. Dec. 871, 876 (1989); *In re Echo Spring Dairy, Inc.*, 45 Agric. Dec. 41, 58-60 (1986); *In re County Line Cheese Co.*, 44 Agric. Dec. 63, 87 (1985), *aff'd*, No. 85-C-1811 (N.D. Ill. June 25, 1986), *aff'd*, 823 F.2d 1127 (7th Cir. 1987); *In re John Bertovich*, 36 Agric. Dec. 133, 137 (1977); *In re Associated Milk Producers, Inc.*, 33 Agric. Dec. 976, 982 (1974); *In re Yasgur Farms, Inc.*, 33 Agric. Dec. 389, 417-18 (1974); *In re Weissglass Gold Seal Dairy Corp.*, 32 Agric. Dec. 1004, 1055-56 (1973), *aff'd*, 369 F. Supp. 632 (S.D.N.Y. 1973).

E. The Market Administrator's Determination Is Consistent With Purpose of the Regulation Defining "Producer-Handler"

The definition of the term "producer-handler," in what subsequently became the New England Milk Marketing Order, was amended on August 31, 1960, by adding the requirement that "the maintenance, care and management of the dairy herd and other resources and facilities necessary to produce the milk . . . [must be] the personal enterprise and risk of such person" (25 Fed. Reg. 8283, 8285 (1960)). This amendment was preceded by a Notice of Recommended Decision and Opportunity to File Written Exceptions to Proposed Amendments to Tentative Marketing Agreements and to Orders issued by the Deputy Administrator, Agricultural Marketing Service, United States Department of Agriculture, and published on June 18, 1960 (25 Fed. Reg. 5488 (1960)), and by a Decision on Proposed Amendments to Tentative Marketing Agreements and to Orders issued by the Acting Secretary, United States Department of Agriculture, and published on August 16, 1960 (25 Fed. Reg. 7819 (1960)). Both of these *Federal Register* publications describe the purpose of the amendment, as follows:

> In order to maintain producer-handler status, it is provided that the maintenance, care and management of the dairy animals and other resources necessary to produce the milk, and the processing, packaging and distribution of the milk shall be the personal enterprise of and the personal risk of the person involved. These standards are intended to distinguish the family-type operation normally involved, and to bring under full regulation operations which attempt to masquerade as those of [10] producer-handlers in their normal concept through leases, rental arrangements, and other devices designed to circumvent regulation by the order.

25 Fed. Reg. at 5494; 25 Fed. Reg. at 7825.

Petitioner represents itself as operating the world's largest dairy store, Petitioner receives and processes about two-thirds of a tanker truck of milk each day, and Petitioner sells approximately 1.2 million gallons of milk per year (Tr. 119, 128, 493-94). Petitioner is not a small operation, but, small operations are generally characteristic of producer-handlers. Moreover, Petitioner is engaging in the very activity which the "own enterprise" and "own risk" amendment is designed to prevent; *viz*., Petitioner is posing as a producer-handler through a lease to

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[10]The words "those of" appear in the Acting Secretary's Decision on Proposed Amendments to Tentative Marketing Agreements and to Orders (25 Fed. Reg. 7819, 7825 (1960)), but do not appear in Notice of Recommended Decision and Opportunity to File Written Exceptions to Proposed Amendments to Tentative Marketing Agreements and to Orders issued by the Deputy Administrator, Agricultural Marketing Service, United States Department of Agriculture (25 Fed. Reg. 5488, 5494 (1960)).

circumvent regulation as a handler under the New England Milk Marketing Order.

F. The Market Administrator's Determination Is Consistent With Prior Cases

This case is another in a long line of cases in which handlers have sought to avoid full regulation under milk marketing orders by leases and other devices employed to claim producer-handler status. The Judicial Officer and the courts have consistently upheld determinations by market administrators that leases and similar devices do not create producer-handler status.[11] Although the cases do not explicitly state that leases can never create producer-handler status, the overall rationale of these cases is that leases and similar devices do not create producer-handler status.

Petitioner relies on *In re Jerome Klocker*, 26 Agric. Dec. 1050 (1967), in support of its contention that its lease of Oakridge Farm's milking cows and milk production facilities qualifies Petitioner as a producer-handler under the New England Milk Marketing Order (Petitioner's Post-Hearing Brief at 12-17).

Petitioner's reliance on *Klocker* is misplaced. The facts in *Klocker* bear no resemblance to the facts presented in this proceeding. In *Klocker*, the Judicial Officer held that the petitioner, who was a producer-handler under a milk marketing order, did not lose his producer-handler status by reason of a contract in which the petitioner sold and leased back his dairy herd and hired the lessor as his employee, due to the unique facts presented and the setting in which the contract was created. In arriving at such conclusion, the Judicial Officer stated:

> We do not have here any elements of a sham transaction to effect a bogus producer-handler status. *Cf., e.g., Elm Spring Farm, Inc. v. United States, supra*. Admittedly, the use of milk from a leased herd is not determinative of the question of satisfaction of the requirements of the "producer-handler" definition contained in the order. Section 1076.13 of the order in effect during part of the period in controversy, that is, during the

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[11] *See United States v. Elm Spring Farm, Inc.,* 38 F. Supp. 508 (D. Mass. 1941), *aff'd,* 127 F.2d 920 (1st Cir. 1942); *In re Echo Spring Dairy, Inc.,* 45 Agric. Dec. 41 (1986); *In re Pleasant View Farms, Inc.,* 36 Agric. Dec. 1262 (1977); *In re Andrew W. Leonberg,* 32 Agric. Dec. 763 (1973), *appeal dismissed*, No. 73-535 (W.D. Pa. Oct. 3, 1973); *In re Clyde Lisonbee,* 31 Agric. Dec. 952 (1972); *In re Sherman Fitzgerald,* 31 Agric. Dec. 593 (1972); *In re Willow Crossing Dairy Farm, Inc.,* 29 Agric. Dec. 1007 (1970); *In re Fred A. Brown,* 23 Agric. Dec. 18 (1964), *aff'd, Brown v. United States,* 367 F.2d 907 (10th Cir. 1966); *In re Eugene M. Olson,* 22 Agric. Dec. 877 (1963); *In re John Velozo,* 5 Agric. Dec. 739 (1946); *In re Martin & Costa,* 4 Agric. Dec. 636 (1945); *In re Antone Amaral,* 3 Agric. Dec. 367 (1944); *In re Henshaw,* 1 Agric. Dec. 721 (1942); *In re Martin S. Cosgrove & Sons, Inc.*, 1 Agric. Dec. 510 (1942), *aff'd, Cosgrove v. Wickard*, 49 F. Supp. 232 (D. Mass. 1943); *In re Martin S. Cosgrove,* 1 Agric. Dec. 503 (1942), *aff'd, Cosgrove v. Wickard,* 49 F. Supp. 232 (D. Mass. 1943).

> period April 1, 1964 to May 1, 1965, defined a producer-handler to mean, in part, "any person who operates a dairy farm and a distributing plant." It is clear, it seems to us, in the setting presented that petitioner met those requirements. Petitioner exercised the powers of management, supervision, direction and control of the dairy herd and farm and such farm was his investment or risk. Surely, the producer-handler need not personally perform the physical acts incident to the production of milk. This is not required with respect to the operation of the processing plant, as pointed out by petitioner. Further, petitioner has established herein, we believe, that Rausch was in reality as well as in form his employee.

In re Jerome Klocker, supra, 26 Agric. Dec. at 1057.

Unlike the petitioner in *Klocker*, Petitioner in this proceeding never owned a dairy farm, does not know how to operate a dairy farm (Tr. 145), was not a producer-handler at the time Petitioner leased Oakridge Farm's milking cows and milk production facilities (Tr. 44-45, 51, 133, 142-44, 178-79, 260), and never managed or operated Oakridge Farm (Tr. 93).

The case law also supports the proposition that a handler does not achieve producer-handler status if the handler merely engages in a sham transaction designed to circumvent the milk pricing regulations or if the lessee fails to assume the risks of milk production. *See, e.g., In re Sherman Fitzgerald*, 31 Agric. Dec. 593, 604-05 (1972) ("In the past, elaborate and ingenious schemes have been employed to achieve apparent producer-handler status and thus to circumvent regulation."). For example:

- In *Elm Spring Farm, Inc. v. United States*, 127 F.2d 920 (1st Cir. 1942), a handler "purchased" cows from various sellers, but paid for the cows with a combination of promissory notes and stock, and the "sellers" were entitled to "repurchase" the cows under liberal terms. 127 F.2d at 923. The "sellers" agreed under separate contracts to maintain the cows and deliver milk to the handler and further guaranteed that the cost of producing milk, including the expense of cattle illness or death, would not exceed the blend price plus a specified figure. *Id.* The court called this scheme an "elaborate camouflage" in which the handler "avoid[ed] the risks of production." *Id.* at 927. *See also Cosgrove v. Wickard*, 49 F. Supp. 232 (D. Mass. 1943) (invalidating a similar scheme in which cows were "purchased" with a small cash payment and substantial note on which no payments were made and where the only payments made on a purported lease were based on the quantity and butterfat content of milk produced).

- In *In re Echo Spring Dairy, Inc.*, 45 Agric. Dec. 41 (1986), the petitioner leased a farm, but had a joint checking account with the lessor and various related businesses, including two other dairy farms, which thereby pooled their resources. *Id.* at 45. The lessor controlled the bank account. *Id.* The ledger sheet of Echo Spring did not reflect whether it had withdrawn more from the account than it had

deposited, or vice versa, and Echo Spring frequently withdrew more than it deposited. *Id.* at 44, 46. The lease payments by Echo Spring were made from the same checking account, *Id.* at 47, meaning the related businesses subsidized Echo Spring's lease payments.

- In *In re Clyde Lisonbee*, 31 Agric. Dec. 952 (1972), the Judicial Officer denied a petition for producer-handler status where the petitioner claimed to be purchasing a herd at Bringhurst farm and claimed that the operation of the milk production facilities was under the petitioner's control. *Id.* at 954. The evidence showed, however, that the petitioner merely accepted milk from the farm, never agreed to a purchase price, and never identified the cows to be "purchased." *Id.* at 954-55. Furthermore, "Petitioner carried no insurance on the cows or on any of the equipment on the Bringhurst farm [and] Petitioner gave Bringhurst no instruction on feeding or caring for the cows." *Id.* at 955.

- In *In re Willow Crossing Dairy Farm,* 29 Agric. Dec. 1007 (1970), the Judicial Officer found that the petitioner was not a producer-handler where the petitioner leased cows that were delivered to the petitioner's property during lactation and returned when they stopped lactating. In that case, the petitioner was not responsible for loss of cows and, when the cows were not on the petitioner's property, the petitioner took no interest in their breeding, care, sale, or health. *Id.* at 1008-09.

> [I]t is plain that the dairy farmers who own the cows suffer the risks of the cows going dry and dying even when the cows are under lease and on the petitioner's premises. Too, the petitioner has no responsibilities for the care of the cows, the breeding of the cows, the health of the cows or any other risk involving the cows when they are not under lease and being fed and milked at petitioner's dry lot.

Id. at 1010.

- In *In re Fred A. Brown,* 23 Agric. Dec. 18 (1964), the Judicial Officer denied a petition for producer-handler status where the petitioner "purchased" an undivided one-tenth interest in cows for $15 per cow, under an arrangement that would return the $15 to the petitioner upon the sale of each cow. *Id.* at 22-23. The petitioner obtained the absolute right to all milk produced by the cows, which stayed in the possession of the majority owner, and the petitioner paid the majority owner a fee "for the services required" that was the same as the price of milk. The Judicial Officer noted that the petitioner assumed no risk, since the $15 fee per cow would be returned. The Judicial Officer stated:

> The record as a whole and the contracts relied upon by petitioners *even if accepted at face value* indicate that petitioners do not operate a dairy farm and do not bear any risk of producing the milk handled by them and that the

production facilities, as distinguished from the milk processing facilities, are not the personal enterprise of petitioners.

Id. at 27-28.

Elm Spring Farm, Inc. v. United States, supra; *Cosgrove v. Wickard, supra*; *In re Echo Spring Dairy, Inc., supra*; *In re Clyde Lisonbee, supra*; *In re Willow Crossing Dairy Farm, supra*; and *In re Fred A. Brown, supra*, all support the proposition that a handler that tries to circumvent the milk pricing regulations by claiming to lease or purchase a farm, while in reality simply buying milk, does not obtain producer-handler status.

The record establishes that Petitioner leased Oakridge Farm's milking cows and milk production facilities for the purpose of changing its status from that of a fully regulated handler to that of a producer-handler exempt from the provisions of the New England Milk Marketing Order applicable to fully regulated handlers. Petitioner's lease of Oakridge Farm's milking cows and milk production facilities did not change the details of the operation of Oakridge Farm. Before the lease, the Bahlers operated Oakridge Farm, with connections to Bahler Farms, Inc., and after the lease, the Bahlers operated Oakridge Farm, with the same connections to Bahler Farms, Inc. (Tr. 93.) Petitioner does not own a dairy farm and does not know how to operate a dairy farm (Tr. 145). Petitioner did not become a dairy farmer by virtue of its lease of Oakridge Farm's milking cows and milk production facilities, and I conclude that Petitioner is a handler that is trying to circumvent the provisions of the New England Milk Marketing Order applicable to fully regulated handlers by claiming to lease milking cows and milk production facilities, while in reality simply buying milk from Oakridge Farm. Under these circumstances, Petitioner is not a producer-handler under the New England Milk Marketing Order.

There are no cases precisely on point to support the proposition that a handler, which leases a dairy farm, dictates the essential elements of the dairy farm's management, and assumes substantially the entire risk of dairy farming, is nevertheless still not a producer-handler. Respondent maintains Petitioner was not operating "at its own risk" because there were numerous risks not assumed or borne by Petitioner in that Petitioner had no interest in the land and anything that happened to the land (such as toxic waste) was at the risk of the dairy farm owner. Moreover, Respondent argues that the capital risk inherent in property ownership remains with the Bahlers. (Respondent's Post-Hearing Brief at 10.)

In December of 1997, Petitioner entered into a lease with Oakridge Farm, an approximately 550-cow dairy farm in Ellington, Connecticut, operated by Vern Bahler and members of his family (PX 2). The operative lease, which is a modification of the December 1997 lease, was signed on June 16, 1998. The lease was for the milking cows and milk production facilities of Oakridge Farm. Specifically, Petitioner leased the herd of milking cows, barns, milking parlors, personal property, and "all equipment necessary to produce raw milk and its related

products" (PX 3 ¶¶ 1- 2). Petitioner also agreed to pay all ordinary and necessary expenses related to the production of milk and "to assume all risk, responsibility, and maintenance of the cows, equipment, buildings, and labor" (PX 3 ¶ 3). The risk and responsibility "include, but are not limited to, life and death of all animals, damage and destruction resulting from acts of God (including storms, fires, pestilence, drought, etc.), damage and destruction resulting from employee negligence and/or malfeasance" (PX 3 ¶ 3). The lease has a term of 2 years (PX 3 ¶ 4).

Petitioner argues that the lease of Oakridge Farm's milking cows and milk production facilities imposes on Petitioner every identifiable expense of dairy farming, from labor costs to building maintenance and also every risk of dairy farming, whether identified in the lease or not. Under the lease, Petitioner dictates all crucial elements of the operation of the enterprise. (Petitioner's Post-Hearing Brief at 9.)

Sample invoices demonstrate that Petitioner pays the cost of fertilizing cows, hardware maintenance and repair, equipment repair, feed, payroll, veterinarian services, and services to keep track of animals (Tr. 188-89). Petitioner also maintains liability insurance on Oakridge Farm, with a benefit of $1 million per occurrence and $2 million per year, plus an umbrella policy with a benefit of $45 million (Tr. 498-99).

Respondent maintains that Petitioner's relationship with Oakridge Farm is effectively "no different than the ordinary relationship between a handler buying milk from producers" (Respondent's Post-Hearing Brief at 13). All of the conditions of the purchase of milk are ones for which any handler may contract with any milk producer. The evidence was uncontroverted that the operation of Oakridge Farm did not change after the lease. The Bahlers operated Oakridge Farm before the execution of the lease and they operated Oakridge Farm after the execution of the lease (Tr. 93). The record does not contain any evidence indicating that Petitioner ever took over operation of the Oakridge Farm milk production facilities. After the June 16, 1998, lease, the Bahlers retained complete control over the operation of Oakridge Farm milk production facilities, including the maintenance, care, and management of the Oakridge dairy herd and other Oakridge Farm resources and facilities that are used to produce milk. Under these circumstances, Petitioner's June 16, 1998, lease of Oakridge Farm's milking cows and milk production facilities is not consistent with the "dairy farmer,"and "own enterprise" requirements in the definition of "producer-handler" in the New England Milk Marketing Order.

Respondent also maintains that the lease fails to support Petitioner's contention that it is a producer-handler because the connections between Oakridge Farm and Bahler Farms, Inc., invalidate any effort at producer-handler status, independent of the principle that a handler cannot become a producer-handler merely by leasing a herd of cows (Respondent's Post-Hearing Brief at 10).

The Bahlers own and operate two contiguous farms, Oakridge Farm and Bahler Farms, Inc. (Tr. 56, 102, 267). Petitioner has no role in the operation of and no interest in Bahler Farms, Inc. (Tr. 48). Therefore, to the extent that Bahler Farms, Inc., and Oakridge Farm are operated jointly, Petitioner does not provide, as Petitioner's own enterprise and at Petitioner's own risk, the maintenance, care, and management of the Oakridge Farm dairy herd and other resources and facilities that are used to produce milk.

The record establishes that Oakridge Farm and Bahler Farms, Inc., share equipment, a full-time calf raiser, a mechanic, and full-time milkers (Tr. 102, 266-68); the Bahlers purchase feed and other materials jointly for Oakridge Farm and Bahler Farms, Inc. (Tr. 98-99, 103-04); the records for Oakridge Farm are kept at Bahler Farms, Inc. (Tr. 268-69); Oakridge Farm and Bahler Farms, Inc., jointly share the financial risk of a loan for which they pledged security to First Pioneer Farm Credit (Tr. 269); and Oakridge Farm and Bahler Farms, Inc., jointly insure against any loss that may arise or result from their joint operation (Tr. 270-71). Since Oakridge Farm is operated, in part, by Bahler Farms, Inc., an entity in which Petitioner has no interest, Petitioner does not provide, as Petitioner's own enterprise and at Petitioner's own risk, the maintenance, care, and management of the Oakridge Farm dairy herd and other resources and facilities that are used to produce milk. Thus, Petitioner is not a "producer handler," as defined in section 1001.10 of the New England Milk Marketing Order (7 C.F.R. § 1001.10).

Petitioner maintains that the Market Administrator's decision that Petitioner is not a producer-handler is arbitrary, capricious, and an abuse of the Market Administrator's administrative authority. Petitioner claims that the Market Administrator's determination denied Petitioner equal protection of the laws and due process because Petitioner contends it has demonstrated that it has assumed the full risk of dairy farming and the Market Administrator has granted producer-handler status to others (already producer-handlers) who have leased farms but plainly assumed less of the risk of dairy farming than has Petitioner. (Petitioner's Post-Hearing Brief at 18-28, 38-41.)

Additionally, Petitioner notes that the Market Administrator admitted that the term "dairy farmer" is not defined anywhere in the New England Milk Marketing Order (Tr. 298); thus, making the Market Administrator the sole power to decide what is and is not a dairy farmer (Petitioner's Post-Hearing Brief at 10 n.5).

The Market Administrator based his decision that Petitioner was not a producer-handler on the definition of "producer-handler" in section 1001.10 of the New England Milk Marketing Order (7 C.F.R. § 1001.10), which requires that, in order to be a producer-handler, a person must be both a dairy farmer and a handler who provides, as the person's own enterprise and at the person's own risk, the maintenance, care, and management of a dairy herd and other resources and facilities that are used to produce milk.

The Market Administrator has permitted three enterprises to lease cows and

milk production facilities and retain their designations as producer-handlers, even though these lessees do not provide, as their own enterprise and at their own risk, the maintenance, care, and management of the leased cows and other resources and facilities used to produce the milk (Tr. 317, 425, 441).

In one instance, a dairy farmer and milk processor retained its producer-handler status despite the existence of three leases pursuant to which the dairy "will be leasing [redacted] head of cattle . . . and [redacted] cattle barn(s)" and "will be responsible for all bills related to the feed, health care and management of the said [redacted] cattle." (PX 9(a), 9(b), and 9(c)). Each lease is terminable by either party on 30 days' notice. *Id.* The leases do not contain any provision relating to risks associated with the farms, such as the risk that cows might perish, or that employees might cause harm, or that acts of God might cause damage. Rather, the lessee is responsible to pay only for feed, health care, and management.

The Market Administrator testified that a milk processor, such as the one involved in the leases in PX 9(a)-(c), could obtain up to 25 per centum of its milk by way of such leases without jeopardizing its producer-handler status (Tr. 253). The Market Administrator conceded that the lessee had not assumed the full risks of the maintenance, care, and management of facilities used to produce milk, but nevertheless retained producer-handler status (Tr. 316-17). Therefore, the milk processor would be escaping significant risks relating to up to one-quarter of the farm operation that supplies its milk.

Another lease which did not cause the Market Administrator to remove the lessee's producer-handler status simply "assigned and transferred" milk produced on a dairy farm to the producer-handler that was leasing the cows (PX 17 Section II(c)). There is not even any pretense that the lessee is providing, as the lessee's own enterprise and at the lessee's own risk, the maintenance, care, and management of the leased cows and other resources and facilities used to produce the milk.

In the third lease, the lessee assumed the risk of loss or damage to milk and also agreed to indemnify the lessor against liability for injuries to workers, but did not otherwise assume the risks of the maintenance, care, and management of the leased cows and other resources and facilities used to produce the milk (PX 18 at 1; Tr. 441).

The Market Administrator justified the distinction between Petitioner and the three other lessees by stating that the other lessees were producer-handlers prior to entering into leases and that they are limited to acquiring 25 per centum of their milk from leased cows (Tr. 252-55, 317, 427, 441). Unlike the three lessees, which have been allowed to retain their producer-handler status, Petitioner was not a producer-handler at the time it entered into the June 16, 1998, lease; Petitioner was not a dairy farmer at the time it entered into the June 16, 1998, lease; and Petitioner acquired 100 per centum of its milk supply from the milking cows and milk production facilities which Petitioner leased from Oakridge Farm.

While the three unidentified lessees arguably do not strictly conform to the

definition of "producer-handler" in section 1001.10 of the New England Milk Marketing Order (7 C.F.R. § 1001.10), correction of their status would not be accomplished by designating Petitioner, who does not conform to the definition of "producer-handler," as a producer-handler.

V. Petitioner's Appeal

Petitioner raises five issues in Petitioner's Appeal. First, Petitioner contends that the Market Administrator's determination that Petitioner is not a producer-handler under the New England Milk Marketing Order is arbitrary and capricious (Petitioner's Appeal at 6-18).

I disagree with Petitioner's contention that the Market Administrator's determination, that Petitioner is not a producer-handler under the New England Milk Marketing Order, is arbitrary and capricious. As fully explicated in this Decision and Order, *supra*, the Market Administrator's determination carries out the purposes of the AMAA and the New England Milk Marketing Order, is consistent with other cases involving the lease of milk production facilities by handlers, and is supported by the facts. I conclude that the Market Administrator's determination is rational and that Petitioner failed to prove that the Market Administrator's determination that Petitioner is not a "producer-handler," as defined in section 1001.10 of the New England Milk Marketing Order (7 C.F.R. § 1001.10), is not in accordance with the law.

Second, Petitioner contends that the ALJ erroneously found that if Petitioner was recognized as a producer-handler under the New England Milk Marketing Order, Petitioner would have a competitive advantage over handlers of 25 to 37 cents per gallon of milk, which advantage would interfere with the orderly operation of the New England Milk Marketing Order. Petitioner points out that there is evidence which supports a finding that Petitioner would, as a producer-handler, enjoy a competitive advantage over handlers, but Petitioner states the finding is based on such "thin evidence as to be unsupported" and the estimates of price advantage "do not account for the cost to Stew Leonard's of operating Oakridge Farm, and therefore have no relationship with the amount of money Stew Leonard's would save -- if any -- by becoming a handler." (Petitioner's Appeal at 11 n.4.)

The ALJ found, as follows:

> 33. If Petitioner were to have been treated as a producer-handler, it would have had a competitive advantage vis-a-vis fully regulated handlers because it would not have had to account to the pool for the use of milk nor make otherwise required payments to the Northeast Dairy Compact (Tr. 244-245, 250). The payment amount that Petitioner would have avoided if it had been a producer-handler was as high as thirty-seven cents per gallon (RX-C; Tr. 247-252).

34. This advantage would interfere with the orderly operation of the Order and of the marketing of milk in Order No. 1. (Tr. 245).

35. If Petitioner were a producer-handler, it would have as much as a twenty-five cent per gallon advantage over his [sic] competitor, Stop & Shop. This is an industry where differences of less than one cent per gallon can have a competitive impact in this industry. (Tr. 452, 482, 484).

Initial Decision and Order at 10-11.

The record supports the ALJ's findings regarding competitive advantages that Petitioner would obtain if Petitioner were found to be a producer-handler and the effect of that competitive advantage on the operation of the New England Milk Marketing Order (RX C; Tr. 244-52, 451-52, 482-85). Moreover, the record does not support a finding that Petitioner paid more for milk after it leased Oakridge Farm's milking cows and milk production facilities than Petitioner paid for milk before Petitioner executed the lease. I do not find that the ALJ's findings regarding potential competitive advantages to Petitioner were error, and I do not find that the ALJ erred by failing to find that Petitioner incurred costs in connection with Petitioner's lease which offset competitive advantages that Petitioner would have obtained had the Market Administrator determined Petitioner to be a producer-handler.

Third, Petitioner contends that case law supports Petitioner's Petition (Petitioner's Appeal at 18-24).

Petitioner cites only one case, *In re Jerome Klocker*, 26 Agric. Dec. 1050 (1967), in which the Judicial Officer concluded that a person who leased cows was a producer-handler. In all of the other cases cited by Petitioner, the Judicial Officer or the courts upheld market administrators' denials of producer-handler status.[12]

In *Klocker*, the Judicial Officer concluded that Klocker, who had been a *bona fide* producer-handler for a number of years, did not lose that status by reason of an April 1, 1964, lease of a dairy herd. Klocker had purchased a farm in 1949, started a dairy farm operation on the premises in 1955, and constructed a milk processing plant on the premises in 1956. The Judicial Officer found that Klocker had been the sole owner of all lands, buildings, machinery, equipment, and facilities of both the dairy farm and the milk processing plant since 1962. In addition, prior to April 1, 1964, Klocker owned 200 dairy cows located on the dairy farm. Then, on April 1, 1964, Klocker sold the dairy cows to Darrel Rausch and on the same day leased

[12] *Elm Spring Farm v. United States*, 127 F.2d 920 (1st Cir. 1942); *Cosgrove v. Wickard*, 49 F. Supp. 232 (D. Mass. 1943); *In re Echo Spring Dairy, Inc.*, 45 Agric. Dec. 41 (1986); *In re Clyde Lisonbee*, 31 Agric. Dec. 952 (1972); *In re Sherman Fitzgerald*, 31 Agric. Dec. 593 (1972); *In re Willow Crossing Dairy Farm*, 29 Agric. Dec. 1007 (1970); *In re Fred A. Brown*, 23 Agric. Dec. 18 (1964).

back the cows and employed Rausch as a farm employee. The cows were never removed from Klocker's premises and Klocker retained ownership of the equipment, buildings, and land devoted to the production of milk. *Id*. at 1051, 1055.

The Judicial Officer found that, due to the unique facts presented and the setting in which the lease of the cows was created, Klocker's status as a producer-handler under Order No. 76 was not changed by virtue of the sale and lease back of the dairy herd, as follows:

> We do not have here any elements of a sham transaction to effect a bogus producer-handler status. Cf., *e.g., Elm Spring Farm, Inc. v. United States, supra*. Admittedly, the use of milk from a leased herd is not determinative of the question of satisfaction of the requirements of the "producer-handler" definition contained in the order. Section 1076.13 of the order in effect during part of the period in controversy, that is, during the period April 1, 1964 to May 1, 1965, defined a producer-handler to mean, in part, "any person who operates a dairy farm and a distributing plant." It is clear, it seems to us, in the setting presented that petitioner met those requirements. Petitioner exercised the powers of management, supervision, direction and control of the dairy herd and farm and such farm was his investment or risk. Surely, the producer-handler need not personally perform the physical acts incident to the production of milk. This is not required with respect to the operation of the processing plant, as pointed out by petitioner. Further, petitioner has established herein, we believe, that Rausch was in reality as well as in form his employee.
>
> Effective May 1, 1965, more specific requirements for producer-handler status were enacted. (See Finding of Fact 8.) Briefly, section 1076.9 requires, in pertinent part, that a "producer-handler" be a dairy farmer and that the "maintenance, care and management of the dairy animals and other resources necessary to produce the milk . . . are the personal enterprise and risk of" the producer-handler. It appears to us that the production of the milk utilized at petitioner's plant continued to be the enterprise and risk of petitioner subsequent to the agreement of April 1, 1964. That agreement did not deprive petitioner of the responsibility for the management, supervision and control of the dairy herd and farm and the risks incident to the production of milk or alter the fact that the production of milk on petitioner's farm was the "personal enterprise" of petitioner.
>
> "The regulatory scheme embodied in the Order is an intensely practical business, and the question now before us is not to be determined by a purely abstract inquiry as to who had 'title' to the cows which produced the milk."

> *Elm Spring Farm, Inc. v. United States, supra*, at p. 926. It is concluded, on the basis of the peculiar or unique facts set forth in the record and especially in view of *the setting* in which the contract of April 1, 1964, was created, that petitioner was a producer-handler as defined in the order. . . . Accordingly, the pertinent contested obligations imposed upon petitioner are not "in accordance with law".

In re Jerome Klocker, supra, 26 Agric. Dec. at 1057-58 (emphasis in original) (footnote omitted).

I disagree with Petitioner's contention that the case law supports Petitioner's Petition. In fact, the cases cited by Petitioner, except *Klocker*, uphold determinations by various market administrators that leases and similar devices do not create producer-handler status. Moreover, *Klocker* concerns a petitioner who was a producer-handler prior to his sale and lease back of the cows, was the owner of the farm on which the cows were located, was responsible for the management, supervision, and control of the dairy herd and farm, and bore the risks incident to the production of milk. Petitioner in this proceeding was not a producer-handler at the time it executed the lease with Oakridge Farm, does not own Oakridge Farm and has not leased Oakridge Farm, and is not responsible for the management, supervision, or control of Oakridge Farm or the dairy herd or milk production facilities located on Oakridge Farm. I find *Klocker* inapposite.

Fourth, Petitioner contends that the Market Administrator's determination that Petitioner is not a producer-handler under the New England Milk Marketing Order conflicts with the AMAA. Specifically, Petitioner asserts that one of the goals of the AMAA is to ensure a sufficient quantity of pure and wholesome milk to meet current needs and that the Market Administrator's determination that Petitioner is not a producer-handler under the New England Milk Marketing Order undermines that goal of the AMAA. (Petitioner's Appeal at 24-25.)

I agree with Petitioner's contention that one of the goals of the AMAA is to ensure an adequate supply of pure and wholesome milk. Section 8c(18) of the AMAA provides, as follows:

> **§ 608c. Orders regulating handling of commodity**
>
> . . .
>
> **(18) Milk prices**
>
> . . . Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 608b of this title or this section, as the case may be, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and

> other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, *he shall fix such prices as he finds will* reflect such factors, *insure a sufficient quantity of pure and wholesome milk to meet current needs* and further to assure a level of farm income adequate to maintain productive capacity sufficient to meet anticipated future needs, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.

7 U.S.C. § 608c(18) (emphasis added).

Moreover, the USDA publication which describes the Dairy Division, Agricultural Marketing Service, makes clear that one of the purposes of the Federal milk order provisions is to ensure that consumers have an adequate supply of pure and wholesome milk, as follows:

> **Objectives**
>
> The objective of the Order Formulation Branch is to develop Federal milk order provisions that stabilize market conditions. This is accomplished through assisting dairy farmers in developing steady, dependable markets by providing prices for their milk that are reasonable in relation to economic conditions. Consumers are then assured of an adequate supply of pure and wholesome milk.

PX 8 at 1.

However, the Market Administrator's determination that Petitioner is not a producer-handler under the New England Milk Marketing Order does not conflict with the goal of an adequate supply of pure and wholesome milk, as Petitioner contends. Producer-handler status is not a prerequisite to having control over the quality of milk that a person receives for processing. Each handler may contract with milk producers for milk that meets that handler's quality standards. (Tr. 273.) The record establishes that Petitioner, a handler under the New England Milk Marketing Order, sought and obtained milk that met its quality standards. The Market Administrator's determination that Petitioner was not a producer-handler under the New England Milk Marketing Order had no effect on the purity and wholesomeness of the milk obtained, processed, packaged, and sold by Petitioner. Therefore, the Market Administrator's determination that Petitioner is not a producer-handler under the New England Milk Marketing Order does not conflict with the goal of ensuring an adequate supply of pure and wholesome milk, as Petitioner contends.

Fifth, Petitioner contends that the Market Administrator's determination that

Petitioner is not a producer-handler under the New England Milk Marketing Order violates Petitioner's right to equal protection of the laws (Petitioner's Appeal at 25-28). Specifically, Petitioner contends that the Market Administrator's determination "– denying producer-handler status to Stew Leonard's on the basis of inadequate risk while granting such status to others who bear demonstrably less risk – is most alarming because it violates the constitutional guarantees of due process and equal protection under the law" (Petitioner's Appeal at 25-26).

The equal protection clause in section 1 of the Fourteenth Amendment to the Constitution of the United States provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Although the equal protection clause of the Fourteenth Amendment is not applicable to the federal government, the concepts of equal protection implicit in the due process guarantees of the Fifth Amendment, which is binding on the federal government, are applicable to the federal government.[13] Equal protection requires that persons similarly situated be treated alike.[14] However, Petitioner has failed to establish that the

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[13] *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995) (holding that the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth Amendment); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 542 n.21 (1987) (stating that the Fourteenth Amendment applies to actions by a state; the Fifth Amendment, however, does apply to the federal government and contains an equal protection component); *United States v. Paradise*, 480 U.S. 149, 166 n.16 (1987) (stating that the reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth Amendment); *Wayte v. United States*, 470 U.S. 598, 608 n.9 (1985) (stating that although the Fifth Amendment, unlike the Fourteenth Amendment, does not contain an equal protection clause, it does contain an equal protection component, and the Court's approach to the Fifth Amendment equal protection claims has been precisely the same as the equal protection claims under the Fourteenth Amendment); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding that the due process clause of the Fifth Amendment contains an equal protection component applicable to the federal government); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (holding that equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (stating that while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process; this Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment).

[14] It should be noted that virtually all statutes and regulations classify people, but equal protection does not prohibit legislative classifications. *See Romer v. Evans*, 517 U.S. 620, 631 (1996) (stating that the Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons); *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (holding that the equal protection clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (stating that the equal protection clause is essentially a direction that all persons similarly situated should be treated alike); *Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966) (stating that the equal protection clause does not demand that a statute necessarily apply equally to all persons, nor does it require things which are different in fact to be

Market Administrator granted producer-handler status to persons that are similar to Petitioner. The Market Administrator has permitted three producer-handlers to obtain additional milk supplies by leasing cows and milk production facilities (PX 9, PX 17, PX 18). These three producer-handlers owned and operated a dairy farm as their own enterprise and at their own risk at the time they leased additional cows and milk production facilities. Moreover, these three producer-handlers may only obtain up to 25 per centum of their milk from leased cows without jeopardizing their status as producer-handlers (Tr. 253).

Petitioner is not similarly situated to these three producer-handlers. Petitioner did not own or operate a dairy farm as its own enterprise and at its own risk at the time Petitioner leased Oakridge Farm's milking cows and milk production facilities. Instead, at the time Petitioner executed the lease, Petitioner was a handler under the New England Milk Marketing Order and did not own or have any interest in a dairy farm, milk production facilities, or cows. Moreover, unlike the three producer-handlers who maintain that status despite their lease of cows and milk production facilities, Petitioner's leased milking cows and milk production facilities provide Petitioner with 100 per centum of the milk which Petitioner processes.

Petitioner has not established that the Market Administrator determined that persons similar to Petitioner are producer-handlers. Therefore, I conclude that the Market Administrator's determination that Petitioner is not a "producer-handler," as defined in section 1001.10 of the New England Milk Marketing Order (7 C.F.R. § 1001.10), is not a violation of Petitioner's right to equal protection of the laws.

VI. Respondent's Cross-Appeal

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treated in law as though they were the same; hence, legislation may impose special burdens on defined classes in order to achieve permissible ends); *Norvell v. State of Illinois*, 373 U.S. 420, 423 (1963) (holding that exact equality is no prerequisite of equal protection of the laws within the meaning of the Fourteenth Amendment); *Tigner v. State of Texas*, 310 U.S. 141, 147 (1940) (holding that the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same); *Stebbins v. Riley*, 268 U.S. 137, 142 (1925) (holding the guaranty of the Fourteenth Amendment of equal protection of the laws is not a guaranty of equality of operation or application of state legislation upon all citizens of a state); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (stating that the equal protection clause does not preclude states from resorting to classification for purposes of legislation); *Magoun v. Illinois Trust & Savings*, 170 U.S. 283, 294 (1898) (holding that a state may distinguish, select, and classify objects of legislation without violating the equal protection clause); *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U.S. 150, 155 (1897) (stating that it is not within the scope of the Fourteenth Amendment to withhold from the states the power of classification; yet classification cannot be made arbitrarily, it must always rest upon some difference that bears a reasonable and just relation to the act in respect to which the classification is proposed); *Hayes v. Missouri*, 120 U.S. 68, 71 (1887) (stating that the equal protection clause of the Fourteenth Amendment does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate; it requires all persons subject to legislation to be treated alike under like circumstances and conditions).

Respondent raises six issues in Respondent's Cross-Appeal. First, Respondent contends that, in Findings of Fact No. 23, the ALJ misstates the Market Administrator's January 15, 1998, letter to Robinson & Cole, LLP (Respondent's Cross-Appeal at 2). Specifically, Respondent states:

> The ALJ says that the market administrator said that Stew Leonard's could not be a producer-handler "until" certain changes were made, possibly suggesting that Stew Leonard's would be a producer-handler if the changes were made. In fact, the market administrator, in that January 15, 1999 [sic], letter (PX 11), stated that the changes would have to be made "before" Stew Leonard's could be a producer-handler. The market administrator is not saying that the changes would create a producer-handler, i.e. Stew Leonard's would still have to meet the "own enterprise and risk" standard of the order. The market administrator is saying only that without the noted changes, Stew Leonard's could not begin to meet the standards.

Respondent's Cross-Appeal at 2.

Petitioner contends that the ALJ's reading of the Market Administrator's January 15, 1998, letter is correct (Petitioner's Reply to Respondent's Cross-Appeal at 4).

I agree with Respondent's contention that the ALJ misstates the Market Administrator's January 15, 1998, letter to Robinson & Cole, LLP (PX 11). The Market Administrator's letter does not contain the word "until," and I do not adopt the ALJ's Findings of Fact No. 23. Instead, I state, in Findings of Fact No. 14, *supra*, that the Market Administrator's January 15, 1998, letter (PX 11) advises Petitioner's counsel that the December 10, 1997, lease of Oakridge Farm's milking cows and milk production facilities fails to cause Petitioner to meet the requirements for producer-handler status under the New England Milk Marketing Order, and I quote the January 15, 1998, letter from the Market Administrator to Robinson & Cole, LLP.

Second, Respondent contends that, in Findings of Fact No. 25, the ALJ incorrectly states that Petitioner had assumed all risks arising from the operation of Oakridge Farm (Respondent's Cross-Appeal at 2-3). Petitioner contends that the ALJ's Findings of Fact No. 25 is correct and should remain undisturbed (Petitioner's Reply to Respondent's Cross-Appeal at 4-6).

I agree with Respondent that the ALJ erroneously found, in Findings of Fact No. 25, "Stew Leonard's has also assumed, pursuant to the June 16, 1998, lease, all risks arising from the operation of Oakridge Farm." As an initial matter, under the June 16, 1998, lease (PX 3), Petitioner did not assume all risks "arising from the operation of Oakridge Farm." Instead, the lease provides that Petitioner agrees to "assume all risk . . . of the cows, equipment, buildings, and labor" (PX 3 ¶ 3). Moreover, the record reveals a linkage between Bahler Farms, Inc., and Oakridge

Farm such that Petitioner's June 16, 1998, lease did not result in Petitioner assuming all risks associated with the maintenance, care, and management of the Oakridge Farm dairy herd and other resources and facilities used to produce milk (Tr. 97-102, 266-72). Therefore, I do not adopt the ALJ's finding, in Findings of Fact No. 25, that, pursuant to the June 16, 1998, lease, Petitioner assumed "all risks arising from the operation of Oakridge Farm."

Third, Respondent contends that, on page 16 of the Initial Decision and Order, the ALJ makes misleading assertions (Respondent's Cross-Appeal at 3). Specifically, Respondent contends, as follows:

> On page 16 of the decision, the ALJ asserts that Stew Leonard's would not ride the pool if it were a producer-handler, and thus not contribute to cutthroat competition. This is misleading. Whether Stew Leonard's would ride the pool or not is not the issue concerning competition. As the ALJ found in findings number 33 and 34, if Stew Leonard's were a producer-handler it would have "a competitive advantage vis-a-vis fully regulated handlers" and this "advantage would interfere with the orderly operation of the Order and the marketing of milk in Order No. 1."

Respondent's Cross-Appeal at 3.

Petitioner contends that the ALJ's observation concerning Petitioner's involvement in the pool is correct (Petitioner's Reply to Respondent's Cross-Appeal at 6-8).

I agree with Respondent that whether Petitioner would ride the pool, as a producer-handler, is not relevant to the issue of the competitive advantage Petitioner would have vis-a-vis fully regulated handlers. Moreover, I agree with the ALJ's findings, in Findings of Fact Nos. 33 and 34, that if Petitioner were designated a producer-handler, it would have a competitive advantage vis-a-vis fully regulated handlers and that Petitioner's advantage would interfere with the orderly operation of the New England Milk Marketing Order and the orderly marketing of milk in the New England marketing area. Therefore, I have not adopted the ALJ's statements, on page 16 of the Initial Decision and Order, that "Stew Leonard's would not contribute to cutthroat competition" nor have I adopted the ALJ's statements regarding whether Petitioner rides the pool.

Fourth, Respondent contends that, while the ALJ implicitly held that the Market Administrator's determination regarding Petitioner's producer-handler status is not arbitrary and is not the result of unequal treatment, the ALJ failed to explicitly state that the Market Administrator's determination is not arbitrary and is not the result of unequal treatment (Respondent's Cross-Appeal at 3-4).

I disagree with Respondent's contention that the ALJ's conclusion regarding the Market Administrator's determination is not explicit. The ALJ concludes, as follows:

> For reasons set forth above, I conclude that the evidence herein shows that the Market Administrator, in the subject case, made a reasoned decision in denying producer-handler status to Petitioner and that the Petitioner has not carried the burden of showing that the Market Administrator's determination was not in accordance with law. Upon consideration of the record as a whole, the case law, and the arguments advanced on briefs, I conclude that the Respondent has exercised reasonable discretion, for articulated reasons that do not deviate from nor ignore the ascertainable goal of the Marketing Order. Accordingly, the decision of the Market Administrator that Petitioner is not a producer-handler is correct and is not contrary to law.

Initial Decision and Order at 37-38.

While the ALJ did not use the words that Respondent would choose, I find that the ALJ's conclusion that "the Market Administrator . . . made a reasoned decision in denying producer-handler status to Petitioner" is an explicit conclusion that the Market Administrator's denial of Petitioner's status as a producer-handler under the New England Milk Marketing Order, is not arbitrary. Moreover, the ALJ's conclusion that "the decision of the Market Administrator that Petitioner is not a producer-handler is correct and is not contrary to law" is an explicit conclusion that the Market Administrator violated no law, including the Fifth Amendment guarantee of equal protection of the law, when he determined that Petitioner is not a "producer-handler," as defined in section 1001.10 of the New England Milk Marketing Order (7 C.F.R. § 1001.10).

Fifth, Respondent states that the ALJ quotes misleading testimony given by the Market Administrator, as follows:

> On page 30 of the Decision, the ALJ includes some cross examination of the market administrator where the market administrator says that the factors he discovered concerning joint ownership of an insurance policy did not color his thinking. This is misleading. Although the market administrator did not know all of this information when he initially denied Stew Leonard's request for producer-handler status, it became part of his decision when he did learn of it. As described in respondent's initial Brief, the market administrator makes his final determinations on handler obligations based on audits conducted subsequent to the actual deliveries of milk. Moreover, the general provisions governing all federal milk marketing orders provide that a handler remains obligated for payments for two years after each month's handler reports are received by the market administrator. 7 C.F.R. 1000.6. Therefore, these factors were ultimately included in the market administrator's determination. In addition, the determination of producer-handler status is done monthly, i.e. the grant of status one month

> does not automatically carry over to the net [sic] month. So, as of approximately December, 1998, the market administrator knew of these facts before each of his succeeding denials of Stew Leonard's request for producer-handler status.

Respondent's Cross-Appeal at 4-5.

I disagree with Respondent's contention that the ALJ's quotation of the Market Administrator's testimony is misleading. The ALJ's quotation of the Market Administrator's testimony is accurate and is not taken out of context. Therefore, while I do not quote the testimony in question in this Decision and Order, I do not find that the ALJ erred by accurately quoting the Market Administrator's testimony.

The Market Administrator testified that, when he made his determinations in February 1998 and July 1998 regarding Petitioner's producer-handler status, he did not take into account the connection between the owners of Bahler Farms, Inc., and the owners of Oakridge Farm and the single insurance policy covering both Bahler Farms, Inc., and Oakridge Farm (Tr. 278-79). However, even without these two factors, I find that the Market Administrator had a rational basis for his February 1998 and July 1998 determinations that Petitioner is not a "producer-handler," as defined in section 1001.10 of the New England Milk Marketing Order (7 C.F.R. § 1001.10). Moreover, the Market Administrator's determination of producer-handler status is made monthly (7 C.F.R. § 1001.10). Once the Market Administrator became aware of the connection between the owners of Bahler Farms, Inc., and the owners of Oakridge Farm and the single insurance policy covering both Bahler Farms, Inc., and Oakridge Farm, those factors could become part of the basis for the Market Administrator's continuing refusal to determine that Petitioner is a producer-handler under the New England Milk Marketing Order.

Sixth, Respondent asserts that "[t]he most significant element of the ALJ's Decision that needs to be amended are the 'concerns' the ALJ expresses over the [M]arket [A]dministrator's exercise of discretion in administering the order. *See* [Initial Decision and Order at] 28, 29, 36-38." (Respondent's Cross-Appeal at 5-6.) Petitioner contends that the ALJ's expression of doubt concerning the Market Administrator's use of discretion in denying Petitioner's Petition is valid and should be preserved (Petitioner's Reply to Respondent's Cross-Appeal at 10).

The ALJ concluded that the Market Administrator's determination that Petitioner was not a producer-handler was a reasoned decision, was correct, and was in accordance with law (Initial Decision and Order at 37-38). I agree with the ALJ's conclusions. In light of the ALJ's conclusions regarding the Market Administrator's determination of Petitioner's status and my agreement with the ALJ's conclusions, I find the ALJ's concerns about the Market Administrator's exercise of discretion are not relevant to the issue in this proceeding; *viz*., whether the Market Administrator's determination that Petitioner is not a "producer-handler," as defined in section 1001.10 of the New England Milk

Marketing Order (7 C.F.R. § 1001.10), is in accordance with law. Therefore, I do not adopt the ALJ's discussion regarding the concerns the ALJ has with the Market Administrator's use of discretion.

I have considered all the contentions of the parties and based upon the facts and existing case law, conclude that Petitioner is not entitled to producer-handler status under the New England Milk Marketing Order. Upon consideration of the record as a whole, the case law, and the arguments advanced on briefs, I conclude that Petitioner has not carried its burden of showing that the Market Administrator's determination was not in accordance with law.

VII. Conclusions of Law

1. Petitioner is a "handler," as defined in section 1001.9 of the New England Milk Marketing Order (7 C.F.R. § 1001.9).
2. Petitioner is not a dairy farmer.
3. Petitioner does not provide, as Petitioner's own enterprise and at Petitioner's own risk, the maintenance, care, and management of the dairy herd or other resources and facilities used to produce milk, which Petitioner leases from Oakridge Farm.
4. Petitioner is not a "producer-handler," as defined in section 1001.10 of the New England Milk Marketing Order (7 C.F.R. § 1001.10).
5. The Market Administrator's determination that Petitioner is not a "producer-handler," as defined in section 1001.10 of the New England Milk Marketing Order (7 C.F.R. § 1001.10), is in accordance with law.

For the foregoing reasons, the following Order should be issued.

VIII. Order

Petitioner's Amended Petition is dismissed.

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